

In the Supreme Court of the United States

FLORIDA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

WELLINGTON N. DICKSON, AKA DUKE, ET AL.

CHRISTOPHER ALSBROOK, PETITIONER

v.

CITY OF MAUMELLE, ET AL.

DENISE DEBOSE AND JAMES MCCULLOUGH,
PETITIONERS

v.

STATE OF NEBRASKA, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE ELEVENTH AND EIGHTH CIRCUITS*

**CONSOLIDATED SUPPLEMENTAL BRIEF
FOR THE UNITED STATES**

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In the Supreme Court of the United States

No. 98-829

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**CONSOLIDATED SUPPLEMENTAL BRIEF
FOR THE UNITED STATES**

Pursuant to this Court's Rule 15.8, the Solicitor General respectfully files this supplemental brief to advise the Court of the United States' position regard-

ing the appropriate disposition of the petitions for writs of certiorari, in light of this Court's recent decision in *Kimel v. Florida Board of Regents*, No. 98-791, and *United States v. Florida Board of Regents*, No. 98-796.

1. These cases present the question whether the Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12111 *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals. In a brief in opposition filed in *Florida Department of Corrections v. Dickson*, No. 98-829, in December 1998, the United States opposed the petition for a writ of certiorari predominantly on the ground that no circuit conflict existed. See Br. in Opp. 5, 13-14.

Since that time, four more courts of appeals have, like the Eleventh Circuit here, upheld the Disabilities Act's abrogation of the States' Eleventh Amendment immunity. See *Garrett v. University of Ala.*, 193 F.3d 1214 (11th Cir. 1999); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999); *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999).¹ On July 23, 1999, however, the en banc Eighth Circuit became the first and only court of appeals to invalidate the Disabilities Act's abrogation of Eleventh Amendment immunity, in a case arising under Title II of that Act. See *Alsbrook v. City of Maumelle*, 184 F.3d 999 (1999), petition for cert. pending, No. 99-423. The

¹ The Fourth Circuit also upheld the Disabilities Act in *Amos v. Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212 (1999). On December 28, 1999, the Fourth Circuit vacated that opinion pending rehearing en banc. Oral argument is scheduled for February 29, 2000.

Eighth Circuit subsequently extended its holding to Title I of the Disabilities Act. See *DeBose v. Nebraska*, 186 F.3d 1087 (1999), petition for cert. pending, No. 99-940.

2. As we advised the Court in a supplemental brief filed in *Dickson* on October 4, 1999, the en banc Eighth Circuit's decisions in *DeBose* and *Alsbrook* have created a square conflict in the circuits regarding the constitutionality of the Disabilities Act's abrogation provision. The United States thus no longer adheres to the view expressed in its brief in opposition that the petition does not merit an exercise of this Court's certiorari jurisdiction. We nevertheless suggested in our supplemental brief that the Court hold the petition pending the Court's decision in *United States v. Florida Board of Regents*, cert. granted, 119 S. Ct. 902 (1999) (No. 98-796), and *Kimel v. Florida Board of Regents*, cert. granted, 119 S. Ct. 901 (1999) (No. 98-791). Those cases presented the question of whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, contains a clear expression of Congress's intent to abrogate, and whether the ADEA reflects a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. We further advised that, within fourteen days of the decision in those ADEA cases, the United States would submit a supplemental filing containing its views, in light of that ruling, as to the appropriate disposition of the *Dickson* petition. Likewise in *Alsbrook* and *DeBose*, in response to petitions seeking review of decisions of the Eighth Circuit invalidating the Disabilities Act's abrogation of Eleventh Amendment immunity under both Title I and Title II of that Act, we filed briefs suggesting that the cases be held pending *Kimel* and advising that we

would make a supplemental filing after the decision in *Kimel*.²

On January 11, 2000, this Court ruled that the abrogation of Eleventh Amendment immunity in the ADEA is invalid because the ADEA does not represent a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Kimel v. Florida Bd. of Regents*, No. 98-791 (Jan. 11, 2000), slip op. 13-26. The usual practice of the Court in such circumstances would be to grant certiorari in these cases, and vacate and remand for reconsideration in light of that decision, and that would be an appropriate course of action here.

3. On the other hand, there are several reasons why the Court might wish instead to grant certiorari now in one or more cases to address the constitutionality of the Disabilities Act's abrogation provision. In that event, *Florida Department of Corrections v. Dickson*, No. 98-829, provides the best vehicle for that purpose, among the several cases in which petitions are now pending, and we recommend that the Court grant the petition in *Dickson* and set it for plenary hearing, and hold the other petitions pending the decision in *Dickson*.

a. The issue is arguably ripe for this Court's review now because there is a firm and entrenched conflict in the circuits. The issue has been thoroughly debated

² *Zimmerman v. Oregon Department of Justice*, No. 99-243, is also pending and purports to raise the same question. Although the United States has not formally intervened in *Zimmerman*, we comment on it in this brief and, therefore, are serving a copy of this brief on counsel in that case. Similarly, because we briefly discuss *Brown v. North Carolina Division of Motor Vehicles*, No. 99-424, we are serving counsel in that case with a copy of this brief, even though that case presents a distinctly narrower question that is, in our judgment, undeserving of this Court's review. See note 6, *infra*.

and fully aired by the courts of appeals over a number of years, starting after this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). See *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 (1997). The issue also was addressed by a number of courts, including the court of appeals here, following this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). See *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); see also *Seaborn v. Florida*, 143 F.3d 1405 (11th Cir. 1998), cert. denied, 119 S. Ct. 1038 (1999); cf. *Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n.7 (1st Cir. 1999) ("we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the provision"). And the courts of appeals decided the issue yet again following this Court's decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999). See *Garrett v. University of Ala.*, 193 F.3d 1214 (11th Cir. 1999); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999); *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999). The latter four courts of appeals, moreover, considered or reconsidered the question following the Eighth Circuit's invalidation of the Disabilities Act's abrogation provision in *Alsbrook*, *supra*, and have uniformly rejected that court's reasoning and conclusion.³

³ In addition to the pending rehearing en banc in the Fourth Circuit in *Amos*, *supra* (see note 1, *supra*), we are aware of cases pending in the courts of appeals of the Second, Sixth and Seventh Circuits in which briefing has been completed and oral argument

Nothing in this Court's decision in *Kimel* suggests that requiring yet a fourth round of consideration by the courts of appeals will either diminish the conflict in the circuits or cast further relevant light on the question presented here. This Court did not appear to establish any new legal standards or broad pronouncements about the scope of the Section 5 power in *Kimel*. Rather, the Court applied the congruence and proportionality test previously established in *Flores* and clarified in *Florida Prepaid* (see *Kimel*, slip op. 18), and concluded that the ADEA's specific structure, scope, and legislative record failed both prongs (*id.* at 18-27). The Court's decision turned upon (1) the state of equal protection jurisprudence regarding specifically the use of age as a proxy for employment decisionmaking (*id.* at 19-21), (2) the broad and sweeping scope of the prohibition on the use of age by employers that the precise terms of the ADEA impose (*id.* at 22-24), and (3) the absence in the ADEA's legislative record of evidence upon which Congress could have found that "state and local governments were unconstitutionally discriminating against their employees on the basis of age" and thus that Congress could reasonably conclude that

heard regarding whether the Disabilities Act is valid Section 5 legislation. See *Kilcullen v. New York State Dep't of Labor*, No. 99-7208 (2d Cir.); *Jackan v. New York State Dep't of Labor*, No. 98-9589 (2d Cir.); *Pomeroy v. Western Michigan Univ.*, No. 97-1751 (6th Cir.); *Wright v. Lima Correctional Inst.*, No. 97-3587 (6th Cir.); *Nihiser v. Ohio Environmental Protection Agency*, No. 97-3933 (6th Cir.); *Satterfield v. Tennessee*, No. 98-5765 (6th Cir.); *Parr v. Middle Tennessee State Univ.*, No. 98-6701 (6th Cir.); *Lane v. Tennessee*, No. 98-6730 (6th Cir.); *Erickson v. Board of Governors*, No. 98-3614 (7th Cir.). Briefing has also been completed in two other Seventh Circuit cases. See *Zihala v. Illinois Dep't of Public Health*, No. 99-1669 (7th Cir.); *Walker v. Washington*, No. 98-3308 (7th Cir.)

“broad prophylactic legislation was necessary *in this field*” (*id.* at 27 (emphasis added)).

That analysis is unlikely to alter materially the courts of appeals’ analysis of the Disabilities Act. For one thing, the state of equal protection jurisprudence with respect to discrimination on the basis of disabilities is quite different from that of discrimination on the basis of age. While this Court reviewed the ADEA against the backdrop of three decisions of the Court uniformly sustaining governmental employers’ use of age, with respect to discrimination against persons with disabilities, this Court’s decisions support the contrary conclusion here. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (“[D]oubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms”); *Alexander v. Choate*, 469 U.S. 287, 295 n.12 (1985) (“well-cataloged instances of invidious discrimination against the handicapped do exist”); cf. *Olmstead v. L.C.*, 119 S. Ct. 2176, 2192 (1999) (Kennedy, J., concurring) (“[T]he line between animus and stereotype is often indistinct.”).

The scope and structure of the Disabilities Act is also distinctly more detailed and nuanced than the ADEA’s, which largely transplanted to the age context procedures and remedies developed to combat racial, gender, and religious discrimination. See *Kimel*, slip op. 27 (noting the “indiscriminate scope of the [ADEA’s] substantive requirements”). Title I of the Disabilities Act does not require governmental entities to articulate a “compelling interest” or to advance their interests by the least restrictive means. It only requires “reasonable accommodations” that do not impose an “undue hardship” on the State. 42 U.S.C.

12112(b)(5)(A); see also 42 U.S.C. 12111(10) (defining “undue hardship” to mean “an action requiring significant difficulty or expense” in light of “the overall financial resources” and “type of operation” of the covered entity). The Disabilities Act’s delineation of the persons protected by the Act, in the definition of “qualified individual with a disability,”⁴ ensures that the scope of coverage is much narrower in the first instance than the ADEA, which regulates state employers’ treatment of almost all persons over age 40. Furthermore, the exhaustively detailed anti-discrimination prohibition and numerous carefully calibrated exceptions and defenses, 42 U.S.C. 12112, 12113, further evidence the distinct structure and operational scope of the Disabilities Act.

Finally, the Disabilities Act’s legislative record,⁵ which builds upon congressional findings and evidence

⁴ See 42 U.S.C. 12111(8). This Court explicated the scope of that definition last Term in *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999); and *Albertsons, Inc. v. Kirkinburg*, 119 S. Ct. 2162 (1999).

⁵ Fourteen congressional hearings and 63 field hearings by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); *id.* Pt. 3, at 24-25; *id.* Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

compiled during the passage of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, provides a solid foundation for Congress’s conclusion that state and local governments, like private employers, engage in unconstitutional discrimination against persons with disabilities and that the problem is sufficiently entrenched and widespread to require a national response.

In short, *Kimel* does not appear to have created new legal principles that would likely alter the courts of appeals’ divided rulings on the constitutionality of the Disabilities Act’s abrogation provision. It applied now-settled law to the particular jurisprudential context, structure, and legislative record of one statute. The courts of appeals have already—and repeatedly—applied that same congruence and proportionality standard to the Disabilities Act; little would be gained or likely changed by requiring them to apply it again.

Moreover, the Disabilities Act is vital civil rights legislation needed to protect persons with disabilities against invidious and irrational stereotypes and limitations on their ability to function in society, and to permit them to enjoy “perfect equality of civil rights and the equal protection of the laws against State denial or invasion” (*Ex parte Virginia*, 100 U.S. 339, 346 (1880)). As a consequence of the Eighth Circuit’s decisions, the operation of this important civil rights legislation has been significantly impaired in seven States. Unlike litigants within the six circuits in which the Disabilities Act’s abrogation of Eleventh Amendment immunity has been sustained, persons with disabilities in the Eighth Circuit cannot fully enforce their federal rights under the Disabilities Act in federal court. Remanding these cases for reconsideration in

light of *Kimel* will perpetuate that disparity in civil rights protection, while uncertainty about the Disabilities Act's status obstructs and delays pending efforts to enforce the Act's provisions nationwide.

b. In addition to the petition in No. 98-829, petitions for writs of certiorari seeking review of the constitutionality of the Disabilities Act's abrogation provision are pending in *Alsbrook v. Maumelle*, No. 99-423; *DeBose v. Nebraska*, No. 99-940; and *Zimmerman v. Oregon Department of Justice*, No. 99-243.⁶ We believe that *Dickson*, which was the first of the pending petitions to be filed, presents the most appropriate vehicle for resolving the question presented. First, the case was decided on a motion to dismiss. That clean record permits straightforward and comprehensive consideration of the constitutional question presented, without simultaneously requiring consideration of the occasionally difficult statutory construction questions posed by the Act. The reasonable accommodation claim made by petitioner, moreover, is typical of the claims most frequently made under the Disabilities Act and thus presents a fair snapshot of both the Act's practical operation and the types of discrimination persons with disabilities encounter in the government workplace.

Second, *Dickson* arises under Title I of the Disabilities Act, which governs discrimination by both

⁶ A petition was also filed in *Brown v. North Carolina Division of Motor Vehicles*, No. 99-424. As we explained in our brief in opposition in *Brown* (at 9-16), that case raises the quite narrow question of whether a particular Justice Department regulation as applied to an infrequently recurring factual scenario and premised on an unsettled construction of the regulation can be sustained under the Section 5 power.

public and private employers.⁷ The cases that arise under Title II—*Alsbrook* and *Zimmerman*—complicate the constitutional question presented by requiring consideration of additional questions, including whether the constitutional inquiry should focus on the Title as a whole or should be undertaken through piecemeal review of the individual regulations established by the Department of Justice pursuant to 42 U.S.C. 12134(a). See *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), petition for cert. pending, No. 99-424.

Alsbrook is a less appropriate vehicle for two additional reasons. There is a serious question whether the plaintiff even qualifies as a person with a disability covered by the Disabilities Act, because his impairment is that he has 20/30 vision, as opposed to 20/20 vision, in one eye, and that impairment limited his ability to work as a police officer in Little Rock, Arkansas. It would be awkward and unusual to apply the congruence and proportionality analysis in the context of a case in which there is a substantial question about the applicability of the Act. Furthermore, the plaintiff's claim is not typical of Title II claims. It is essentially an employment claim that would be covered by Title I were it not for the fact that employment was predicated on the State licensing board's certification of a police officer,

⁷ *DeBose*, which is the last of the pending petitions to be filed, is also a Title I case. Because that case arises from a lengthy jury trial for which the content, character, and strength of the evidence presented has never been summarized or reviewed by any of the lower court opinions, the preferable course might be to hold *DeBose* for a decision in *Dickson*. Otherwise unknown factual contours or procedural wrinkles in the case could impair or detract from consideration of the constitutional question, which is directly and straightforwardly presented in *Dickson*.

and it was that certification that was denied because of the plaintiff's 20/30 vision in one eye.

Zimmerman is a similarly problematic vehicle. Like *Alsbrook*, *Zimmerman* presents an employment claim that ordinarily would have been covered by and litigated under Title I; here it was not because the plaintiff did not exhaust his administrative remedies. *Zimmerman* Pet. 2. The case thus would require resolution of the predicate question whether Title II applies to employment decisions at all. In addition, the Eleventh Amendment immunity question is a late arrival to this litigation. It was raised for the first time by the plaintiff—not the State—in his petition to this Court. It thus was not addressed by either the district court or the court of appeals. The State, moreover, adopted the assertion of immunity only after this Court called for a response to the petition. The abrogation question thus arises in an extraordinary posture where it is raised in the litigation by a party who does not believe immunity attaches and has questionable authority to assert the immunity on the State's behalf. See *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment * * * does not automatically destroy original jurisdiction. * * * Unless the State raises the matter, a court can ignore it.") (citations omitted); see also *id.* at 393-394 (Kennedy, J., concurring).

* * * * *

The Court may wish to grant, vacate, and remand all the pending Disabilities Act cases. Alternatively, the Court may wish to address the constitutionality of the Disabilities Act's abrogation provision at this time. If the Court chooses the latter course, it should grant and set for plenary argument the petition for a writ of

certiorari in *Florida Department of Corrections v. Dickson*, No. 98-829. The petitions filed in *Alsbrook v. Maumelle*, No. 99-423; *DeBose v. Nebraska*, No. 99-940; and *Zimmerman v. Oregon Department of Justice*, No. 99-243, should be held pending the Court's decision in *Dickson* and then disposed of in accordance with the decision of the Court.

Respectfully submitted.

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